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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

EVA CASAZZA, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fourth Amendment permits the impoundment by police of a dwelling or dwelling-type structure in order to maintain the status quo while a search warrant is sought.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI:

THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES WAS NOT TRANSGRESSED WHEN SHERIFF'S DEPUTIES INFORMED RESPONDENTS THAT, IF CONSENT TO SEARCH WAS WITHHELD, THEIR YACHT WOULD BE SECURED AND RESPONDENTS WOULD HAVE TO DISEMBARK WHILE DEPUTIES SOUGHT TO SECURE A SEARCH WARRANT. THUS, RESPONDENT KENNETH CHARTIER'S CONSENT TO SEARCH THE YACHT WAS VOLUNTARY..... 7

CONCLUSION 18

APPENDIX A: Appellate Court decision 1a

APPENDIX B: Supreme Court decision 10a

TABLE OF AUTHORITIES

Page

Arkansas v. Sanders, 442 U.S. 753 (1979) 10, 13

Chambers v. Maroney, 399 U.S. 42 (1970) 10

Davis v. United States, 328 U.S. 582 (1946) 9

Mincey v. Arizona, 437 U.S. 385 (1978).....11, 14

Rawlings v. Kentucky, 448 U.S. 98 (1980) 11

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)..... 10

Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984)..... *passim*

United States v. Chadwick, 433 U.S. 1 (1977)..... 10

2 W. LaFave, Search and Seizure Section 6.5(c), pg. 676 (1978).....12, 13

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Petition For Writ Of Certiorari To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 202 Ill. App. 3d 792, 560 N.E.2d 386, 148 Ill. Dec. 84 (3d Dist. 1990). (See Appendix A) The opinion of the Supreme Court of Illinois has not yet been reported, but a copy of the opinion is attached hereto. (See Appendix B)

JURISDICTION

The opinion of the Supreme Court of Illinois was filed on October 17, 1991. No petition for rehearing was filed by the petitioner in the Illinois Supreme Court.

This court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The instant petition for writ of certiorari is filed within 90 days of the Illinois Supreme Court's decision affirming the suppression of evidence. The decision of the Supreme Court of Illinois was premised upon federal constitutional grounds and does not rest upon independent state grounds.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV, provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV provides that:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, who had been charged by criminal complaint with the offenses of unlawful delivery of not more than 2.5 grams of cannabis (C. 2), and unlawful possession of more than 2.5 grams but less than 10 grams of cannabis (C. 3), filed a pretrial motion to suppress evidence (C. 26-27). The gist of the motion asserted that law enforcement officials did not have probable cause to arrest Kenneth Chartier nor did they have a reasonable suspicion to otherwise detain and question him under the Fourth Amendment. (C. 27) A hearing on respondents' motion to suppress was conducted on January 12, 1990.

Evidence was presented through the testimony of Investigator Joseph G. Farmer and Sergeant Lynn Jencon of the Will County Sheriff's Department. Their testimony revealed that on the morning of September 4, 1989, sheriff's personnel were assigned to investigate the death of a 17-year-old drowning victim. (R. 4-5) Information had been received that on the evening of September 3, 1989, the victim and six other youths went to a 50-foot maroon and white yacht moored at the Three Rivers Marina for a party. While there on the yacht, the victim and other youths drank beer and smoked marijuana. (R. 5-6, 26) At approximately 2:30 p.m. on September 4, 1989, members of the sheriff's department arrived at the marina and located the yacht in question. (R. 7, 25) Investigator Farmer testified that the officers were met on the dock by

respondent Elizabeth Chartier. She was advised why the sheriff's department was there and that they would like to speak with her. Elizabeth Chartier then consented and allowed the sheriff's personnel to board the yacht. (R. 7-8, 25)

Once on board the yacht, Investigator Farmer explained to Elizabeth Chartier that they were investigating the drowning death of Timothy Cotter. Elizabeth Chartier was advised that the sheriff's department had received information that Cotter, along with several other youths, had been on the yacht on the night of September 3, and while present, the youths were given beer to drink and marijuana to smoke. Elizabeth Chartier informed Investigator Farmer that she was aware of the situation, acknowledging that Cotter had been on board the yacht the previous evening. At that time, Elizabeth Chartier was asked if she was the owner of the yacht and if she would consent to a search of the yacht. Elizabeth Chartier advised the officers that the yacht was in her husband's name and that law enforcement personnel could not search it. (R. 9, 17, 25, 26) After being refused consent to search the yacht, Sergeant Jencon advised Elizabeth Chartier that the sheriff's department had been in contact with the state's attorney's office and that law enforcement personnel could obtain a search warrant if needed. Sergeant Jencon then advised Elizabeth Chartier that if a search warrant had to be obtained the individuals on the yacht would have to disembark while the officers attempted to obtain a search warrant. (R. 9, 26)

After being so advised, Elizabeth Chartier and her guests were in the process of leaving the yacht (R. 9, 26), when Investigator Farmer was met on the dock by

respondent Kenneth Chartier (R. 9-10, 27). Kenneth Chartier asked Investigator Farmer what was occurring. Investigator Farmer advised Kenneth Chartier that the sheriff's department was investigating a drowning death. He further explained to Kenneth Chartier that the sheriff's department had received information that certain youths had been on board Chartier's yacht on the night of September 3, and while there the youths consumed beer and smoked marijuana. Investigator Farmer then asked Kenneth Chartier if he would consent to a search of the yacht. Kenneth Chartier asked what would happen if he did not consent. Investigator Farmer then advised Kenneth Chartier that a search warrant could be obtained. Kenneth Chartier then asked for a minute to think about the matter. After being permitted to consider the situation outside the presence of police, Kenneth Chartier invited the officers back on board the yacht and consented to a search of his yacht. (R. 10-11)

Prior to searching the yacht, Investigator Farmer advised Kenneth Chartier of his constitutional rights under *Miranda* and also advised him of his right to refuse to consent to the search of yacht. Kenneth Chartier was presented with two forms: one was his *Miranda* rights form and the other a consent to search form. Kenneth Chartier read and signed both forms. (R. 11, 13-14, 27) Investigator Farmer then advised Kenneth Chartier that the latter could accompany the officers during the search of the yacht. Kenneth Chartier accepted the investigator's offer. (R. 11, 27) During the course of the search, marijuana which formed the basis for the instant criminal charges was seized from the yacht. (R. 11-12, 27-28, 29)

Upon completion of the evidentiary portion of the hearing, arguments of respective counsel were then presented. The trial judge, after delineating the issue as being whether the consent by Kenneth Chartier to a search of his yacht was executed freely and voluntarily (R. 44), determined that the officer's statement that, if respondents did not consent to a search of the yacht, the officers would secure the yacht and the individuals would have to disembark while police attempted to obtain a search warrant, resulted in a coerced and involuntary consent by Kenneth Chartier to a search of his yacht. As a result, the trial judge granted respondents' motions to suppress all evidence seized pursuant to the consent executed by respondent Kenneth Chartier on September 4, 1989. (R. 48)

The Illinois Appellate Court, Third Judicial District, with one justice dissenting, affirmed the trial judge's granting of the respondents' motion to suppress, concluding that, while it might have decided the issue differently as a trial court, it could not say that the trial judge's decision was clearly unreasonable based on the record before it. (202 Ill. App. 3d at 795; Appendix A at 4a) Citing to this Court's decision in *Segura v. United States*, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), Justice Heiple in dissent concluded that the police had merely informed Kenneth Chartier of accepted police procedures, and therefore respondent Chartier's consent was voluntary. (Heiple, P.J., dissenting, 202 Ill. App. 3d at 797; Appendix A at 9a)

The petitioner herein then sought leave to appeal the decision of the Illinois Appellate Court to the Supreme Court of Illinois, which was granted. Subsequently, the

Illinois Supreme Court affirmed both the appellate and circuit courts' determinations that respondent Kenneth Chartier's consent was involuntary. The Illinois Supreme Court's determination concerning the voluntariness of respondent Kenneth Chartier's consent rested upon the court's conclusion that a majority of the United States Supreme Court did not concur within part IV of the lead opinion in *Segura* was relied upon by the state to reverse the order of suppression. (___ Ill.2d ___; Appendix B at 17a) In substance, the Illinois Supreme Court concluded that the police had illegally represented to respondents that the officers had the authority to seize the yacht while they (the officers) attempted to obtain a search warrant. Since the Illinois Supreme Court found that police impoundment of premises violated the fourth amendment, the court found it to logically follow that respondent Kenneth Chartier's consent was involuntary. (___ Ill.2d ___; Appendix B at 20a)

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST UNREASONABLE SEARCHES AND SEIZURES WAS NOT TRANSGRESSED WHEN SHERIFF'S DEPUTIES INFORMED RESPONDENTS THAT, IF CONSENT TO SEARCH WAS WITHHELD, THEIR YACHT WOULD BE SECURED AND RESPONDENTS WOULD HAVE TO DISEMBARK WHILE DEPUTIES SOUGHT TO SECURE A SEARCH WARRANT. THUS, RESPONDENT KENNETH CHARTIER'S CONSENT TO SEARCH THE YACHT WAS VOLUNTARY.

In the case *sub judice,* the fourth amendment issue raised concerns the constitutionality of impounding or

securing a dwelling or similar structure while a search warrant is sought. The issue here was touched upon by this Court in *Segura v. United States,* 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 559 (1984) in a somewhat different context. In this case, the constitutional question posed arose during a challenge to the voluntariness of respondent Kenneth Chartier's consent to a search of his yacht. Thus, there are actually two components to the instant case.

The first component comprises the general issue presented by respondents' motion to suppress, that is, the voluntariness of respondent Kenneth Chartier's consent given to sheriff's deputies to conduct a search of the former's yacht for drugs. The second component, which is directed at the propriety of the sheriff's deputy's conduct, directly addresses the constitutional viability of the impoundment of a dwelling or similar structure by police in order to maintain the status quo while a search warrant is sought. Accordingly, the fourth amendment question at issue here not only directly relates to the propriety of the police conduct, but it also impacts upon the decision regarding the voluntariness of respondent Kenneth Chartier's consent to search.

According to the evidence, after the sheriff's official advised respondent Kenneth Chartier concerning the purpose of his investigation, and requested that respondent consent to a search of his yacht, respondent asked Investigator Farmer what would happen if he refused to consent. Respondent then was advised that the deputies could obtain a search warrant if needed. (R. 10-11) It had also been shown that Elizabeth Chartier earlier had been informed not only of the possibility that a search warrant

could be obtained, but that once she refused to consent, everyone on board the yacht would have to disembark until such time as it could be determined whether or not the officers would be able to obtain a warrant. In other words, the sheriff's deputies were prepared to secure the yacht while a search warrant was sought. (R. 9, 26) As the Supreme Court of Illinois observed, the trial judge's *ratio decidendi* was his finding that respondent Kenneth Chartier's consent to search was coerced as a result of the position taken by the sheriff's deputies, that they would secure the yacht and cause all on board to disembark if a consent to search was refused. (Appendix B, at 11a) Accordingly, resolution of the voluntariness of respondent Kenneth Chartier's consent hinges upon the constitutionality of the sheriff's officials' conduct of impounding the yacht while a search warrant was sought.

Because of the interplay between the constitutional question here posed and the factual context within which the question is asserted, the starting point has to focus upon the matter of consent. It is well settled that one of the specifically established exceptions to the fourth amendment's warrant requirement is a search that is conducted pursuant to consent. *Davis v. United States*, 328 U.S. 582, 593-94 (1946). With respect to a search undertaken pursuant to consent, when the subject of the search is not in custody and the state attempts to justify a search on the basis of his consent, the fourth and fourteenth amendments require that the state demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is

a question of fact to be determined from all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49.

In the case at bar, the question of the voluntariness of respondent Kenneth Chartier's consent hinges on the constitutionality of the deputy's admonishments to respondents, prior to receiving the consent to search, concerning their ability to impound the yacht, and require the respondents and their guests to disembark from the yacht while the search warrant was sought. On this point, this Court's decision in *Segura* underscores Illinois' instant constitutional argument. *Segura*, 468 U.S. 797-98.

In Part IV of *Segura*, then Chief Justice Burger observed that, assuming, *arguendo*, that the agents in *Segura* had seized the entire apartment's contents as contended by respondent, the seizure was reasonable under the fourth amendment. 468 U.S. at 806. The chief justice observed that a seizure affects only a person's possessory interests, while a search affects a person's privacy interests. Because of the less intrusive nature of a seizure, the chief justice noted that the Court frequently approved of warrantless seizures of property on the basis of probable cause for the time necessary to secure a warrant, especially when a warrantless search would either be held to be or likely would have been held impermissible. Citing, *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *United States v. Chadwick*, 433 U.S. 1, 13-14, n.8 (1977); and *Arkansas v. Sanders*, 442 U.S. 753, 763-64 (1979). It was further observed that the Court had not had occasion to consider whether, when officers have probable cause to believe that evidence of criminal activity is on the premises, the temporary securing of a dwelling to prevent the

removal or destruction of evidence violates the fourth amendment. *Segura*, 468 U.S. at 809. However, citing to *Mincey v. Arizona*, 437 U.S. 385 (1978), and *Rawlings v. Kentucky*, 448 U.S. 98 (1980), the chief justice noted the Court's suggestion that the securing of premises under such circumstances would not violate the fourth amendment, at least when the action undertaken was to preserve the *status quo* while a search warrant was being sought. *Segura*, 468 U.S. at 809. Because the fourth amendment protects people and not places, and since a seizure affects only possessory interests and not privacy interests, the chief justice concluded that the heightened protections accorded privacy interests are not implicated whenever a seizure of the premises is at issue as opposed to a search of those premises. This then led the chief justice to conclude that securing a dwelling on the basis of probable cause in order to maintain the *status quo* while a search warrant was being sought would not constitute an unreasonable seizure of either the dwelling itself or the contents thereof. At the same time, the chief justice reaffirmed the established principle that, absent exigent circumstances, a warrantless search of the impounded premises would be illegal. *Segura*, 468 U.S. at 810.

As a distinguished constitutional scholar on search and seizure has observed, what may be gleaned from the Court's determination in *Segura* is the following: 1) no view was expressed as to when, if ever, impoundment may legitimately extend to limiting the freedom of movement of persons either into or out of the impounded premises; 2) this Court as a whole appeared to agree that the mere seizure of the premises and its contents is

permissible on probable cause even absent exigent circumstances; and 3) this Court also unanimously accepted the proposition that a search, that is, an entry into the premises, needed to facilitate the impoundment requires both probable cause as well as exigent circumstances. 2 W. LaFave, Search and Seizure Section 6.5(c), pg. 676 (1978). With respect to this first observation regarding *Segura,* Professor LaFave propounded that a factor which ought to weigh heavily upon the side of upholding an impoundment as a lawful alternative to warrantless searches is whether those individuals within the place to be impounded have been "afforded an opportunity to avoid continuing personal scrutiny." 2 W. LaFave, Sec. 6.5(c) at 681. With respect to visitors found on the premises, Professor LaFave suggests that these individuals are always free to depart thereby enabling them to avoid continuing police scrutiny. 2 W. LaFave, Sec. 6.5(c) at 681. However, the situation became markedly different with respect to those individuals who reside in the premises to be impounded.

Although residents might well be given the alternative of departing the premises pending the issuance of a search warrant, Professor LaFave provided yet another alternative for these individuals. He suggested the following:

> . . . But very often these persons will have sufficient joint control over the premises that they could give an effective consent to an instant warrantless search of those premises. Because "an impoundee might prefer submitting to a warrantless search rather than suffering through an impounding until a warrant could be obtained," perhaps the police should tender

> this option to the impoundee. A consent given under these circumstances is not inherently ineffective, any more than a consent given by a person who is under arrest or a person who has been advised that in the absence of consent a search warrant will be sought. But the consent would be invalid if given in response to a threat to impound in an unreasonable manner or for an unreasonable length of time. [2 W. LaFave, Sec. 6.5(c) at 681-82]

The observation of Professor LaFave in this regard is consistent with the view expressed by the Court that "an individual, who finds himself not only in an inconvenient position of having to await the arrival of a search warrant, but that such inconvenience is unacceptable, may avoid any such inconvenience simply by consenting to a search." *Arkansas v. Sanders*, 442 U.S. at 764, n. 12 (1979).

Clearly, impoundment of premises for the purpose of maintaining the *status quo* while a search warrant is sought should be recognized as a legitimate warrantless procedure within the parameters of the fourth amendment. The employment of such a procedural device would serve the salutary purposes of the fourth amendment. On the one hand, impoundment predicated upon probable cause aids the investigatory process by insuring that evidence on the premises will not be lost while police in good faith seek a search warrant. On the other hand, the impoundment procedure is limited simply to the act of impounding, i.e., the act of seizing or taking control of the premises without conducting any type of warrantless search or prying. The impoundment procedure duly recognizes the fourth amendment's concern "that the privacy of a person's home and property may not be totally

sacrificed in the name of maximum simplicity in enforcement of the criminal law". *Mincey v. Arizona*, 437 U.S. 385, 393. The fourth amendment's basic guarantee is preserved under the impoundment procedure since law enforcement authorities are limited solely to a seizure of the premises and are otherwise precluded from conducting any type of prying into the residence. Accordingly, the Court should embrace the theory of impoundment as a legitimate police investigatory procedure justified within the parameters of the fourth amendment.

As applied to the case at bar, it should not be concluded that respondent Kenneth Chartier's consent to search was coerced because of the sheriff's deputy's admonishment that the yacht would be impounded pending the procurement of a search warrant if respondents refused to consent. As the facts adequately establish, the sheriff's deputies had probable cause to believe that marijuana was present on the yacht. (R. 5-6) The sheriff's deputies' presence on the yacht was the result of their having obtained permission to board the yacht from respondent Elizabeth Chartier. (R. 7-8, 25-26) (In essence, there was no unlawful search (entry) as found in *Segura*.) Both respondents (Kenneth and Elizabeth Chartier) were specifically advised as to the purpose for the deputies' presence. (R. 8, 10) After being advised of the reason for their presence, respondent Elizabeth Chartier was asked if she would consent to a search of the yacht, but she refused. She was then advised that the yacht would be impounded. (R. 9) On the other hand, after respondent Kenneth Chartier was asked if he would consent to a search of the yacht, he responded by asking what would happen if he did not consent. At that point, Investigator

Farmer advised respondent Kenneth Chartier that the officers could obtain a search warrant if need be. Kenneth Chartier then asked to think about this matter. After being permitted the opportunity to do so (without the deputies being present), respondent Kenneth Chartier permitted the officers to re-board the yacht and advised them that he would consent to a search of the yacht. (R. 10-11) Moreover, prior to conducting the search, respondent Kenneth Chartier was advised not only of his constitutional rights under *Miranda,* but also his ability to refuse to consent to the search of the yacht. Investigator Farmer prepared and read a consent to search form to respondent Kenneth Chartier after which he not only read the consent form himself, but also signed it. (R. 11, 13-14)

Clearly, the deputy's admonishment that all on board would have to leave the yacht while a search warrant was being sought was made to secure the yacht in order to prevent either the destruction or removal of the evidence, or the removal of the boat from slip 84 while the search warrant was being sought. Furthermore, there is no indication in this record that the sheriff's deputies themselves would have remained on board the yacht once the respondents had disembarked. As *Segura* unequivocally holds, impoundment would not have violated the fourth amendment rights of the respondents because the deputies had probable cause and because the seizure of the boat only affected the respondents' possessory interests and not their privacy interests. The fact that in the first instance respondent Elizabeth Chartier was informed of the impoundment following her refusal to consent to a search obviously had no coercive impact upon her since,

rather than capitulating and consenting, respondent Elizabeth Chartier along with respondent Eva Casazza and other guests proceeded to make arrangements to disembark.

Similarly, with respect to respondent Kenneth Chartier, any acknowledgment of the deputies' intent to impound the yacht came after respondent Kenneth Chartier had inquired as to what would occur if he did not consent to a search of the yacht. This should not be found coercive because: 1) respondent Kenneth Chartier asked what would occur if he did not consent; 2) Investigator Farmer rightfully advised respondent Kenneth Chartier not only of the pending impoundment, but also of the fact that a search warrant would be sought; and 3) respondent Kenneth Chartier was permitted an opportunity (per his own request) to consider the matter before actually making a decision. It was only after all of these events transpired that the respondent consented to a search of the yacht. And then, before any search was conducted, respondent Kenneth Chartier was not only advised of his *Miranda* rights, but also of his rights pursuant to the consent to search form which ostensibly gave respondent Kenneth Chartier the opportunity to withdraw his oral consent that he had just given. The deputies' admonishment had no coercive impact at all.

The conduct of the sheriff's deputies in advising respondents that the former would secure the latters' yacht pending the procurement of a search warrant was legally correct. As such, the totality of the deputies' conduct cannot be found to constitute coercion as would invalidate respondent Kenneth Chartier's eventual consent to the search of his yacht. Under the circumstances

presented, Illinois believes that *Segura* sanctions the impoundment procedure under the fourth amendment thereby establishing the error in the sustainment of the trial judge's suppression order by the Supreme Court of Illinois. Therefore, the Illinois Supreme Court's determination that not only the fourth amendment, but this court's determination in *Segura,* did not support the deputies' conduct in the case at bar is erroneous and should be reversed.

CONCLUSION

For the reasons and arguments stated herein, the petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Illinois to review that court's decision which affirmed the trial judge's

determination to grant respondents' motions to suppress in the instant proceeding.

Respectfully submitted,

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January 15, 1992

APPENDIX

A

No. 3-90-0080

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1990

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. EVA CASAZZA, ELIZABETH CHARTIER, and KENNETH CHARTIER, Defendants-Appellees.	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois No. 89-CM-3418 Pub. In Full Honorable Edwin B. Grabiec Judge Presiding (Filed Sept. 5, 1990)

Justice Scott delivered the opinion of the court:

The defendants, Eva Casazza, Elizabeth Chartier, and Kenneth Chartier, were charged with unlawful delivery of cannabis and unlawful possession of cannabis (Ill. Rev. Stat. 1989, ch. 56½, pars. 705(a), 707(a), 704(b)). The defendants thereafter filed a motion to suppress certain evidence seized during a search of Kenneth's yacht. Following a hearing, the trial court allowed their motion. The State appeals.

At the suppression hearing, Will County Sheriff's Department investigator Joseph G. Farmer testified that on September 4, 1989, he was assigned to investigate the death of a 17-year-old boy who had drowned on the evening of September 3 at the Three Rivers Marina in Wilmington, Illinois. Three teenagers informed Farmer that two 40-year-old women had invited them to their 50-foot yacht on the night of September 3. After arriving at the yacht, the teenagers smoked marijuana with the women. The investigator noted that he had received similar information from other sources who told him that on the night in question the drowning victim and six other youths had attended a party on the yacht. The other sources also stated that while on the yacht, the youths had drunk beer and smoked marijuana.

Farmer testified that around 2:30 p.m. on September 4, he and Will County Sheriff's Department sergeant Lynn Jencon arrived at the marina and located the yacht in question. The officers were met by Elizabeth Chartier. She and others were staying on the boat for the Labor Day weekend. Investigator Farmer explained to Elizabeth that he was investigating the drowning incident and that he had received information that the drowning victim drank beer and smoked marijuana while on the yacht. Farmer then asked Elizabeth if she would consent to a search. She responded that title to the boat was in her husband's name and that the officers could not search it. At that point, Sergeant Jencon advised Elizabeth that he had been in contact with the state's attorney's office and that a search warrant could be obtained. Jencon also told her that until the warrant was obtained she and the other occupants would have to leave the boat.

According to Investigator Farmer, as the occupants of the boat were preparing to leave, he met Kenneth Chartier on the dock. Farmer informed Kenneth of the reason for the investigation and asked him if he would consent to a search of the yacht. Kenneth asked what would happen if he did not consent. Farmer told Kenneth that if he did not sign a search consent form the police "could obtain a warrant" and in the interim he would have to leave the vessel. After considering the matter, Kenneth told the officers that they could search the yacht. Prior to searching, Farmer advised Kenneth of his constitutional rights and of his right to refuse to consent to the search. Kenneth then signed a constitutional rights waiver form and a consent to search form. Thereafter, Farmer conducted a search of the yacht accompanied by Kenneth.

Sergeant Lynn Jencon also testified regarding the circumstances surrounding the search and corroborated much of the testimony of Investigator Farmer. Jencon noted that Farmer advised Elizabeth that they were investigating a drowning death. Elizabeth responded that she was aware of the situation since the youth had been on the boat the previous night. Jencon further stated that after Kenneth signed the consent to search form he accompanied the officers as they conducted their search. According to Jencon, a green leafy material was found in a dresser in the bedroom near the kitchen. Jencon further stated that suspected contraband was also seized from a room occupied by Kenneth.

Based on the foregoing evidence, the trial court concluded that Kenneth's consent to the search had not been voluntarily given. The court further concluded that his consent was vitiated by the threats of the officers that

they could obtain a warrant and that he and the occupants of the boat would have to leave in the interim.

On appeal, the State contends that the trial court erroneously concluded that Kenneth's consent to the search was not voluntarily given.

To support a search undertaken pursuant to consent, the State must prove by a preponderance of the evidence that the consent was voluntarily given. (*People v. Holliday* (1983), 115 Ill. App. 3d 141, 450 N.E.2d 355.) The voluntary character of the consent presents a question of fact to be resolved from a consideration of the totality of the circumstances. (*Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041; *People v. Griffin* (1987), 158 Ill. App. 3d 46, 510 N.E.2d 1311.) A trial court's determination regarding the voluntariness of the consent will not be disturbed on review unless it is clearly unreasonable. *People v. Wahlen* (1982), 111 Ill. App. 3d 194, 443 N.E.2d 728.

Here, the trial court had before it evidence of all the circumstances surrounding the consent, including the officers' threats that they could obtain a warrant and that they would secure the premises in the interim. In addition, the court correctly noted that these threats were made on Labor Day weekend to people who were dwelling on the vessel for the weekend. While we might have decided this issue differently as a trial court, based on the record before us, we are unable to say that the instant trial court's decision was clearly unreasonable.

Accordingly, the judgment of the circuit court of Will County is affirmed.

Affirmed.

Barry, J., concurs.

Heiple, J., dissenting.

No. 3-90-0080

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 1990

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. EVA CASAZZA, ELIZABETH CHARTIER, and KENNETH CHARTIER, Defendants-Appellees.	)	Appeal from the Circuit Court of 89-CM-3418 Honorable Edwin B. Grabiec Judge Presiding

PRESIDING JUSTICE HEIPLE, dissenting: Pub. In Full

Defendants, Eva Casazza, Elizabeth Chartier, and Kenneth Chartier, were charged with the offenses of unlawful delivery of cannabis and unlawful possession of cannabis. Prior to trial, defendants filed a motion to suppress evidence seized during a search of Kenneth Chartier's yacht. Following a hearing, the trial court granted defendants' motion to suppress, ruling that defendants' consent to the search was not voluntary. The State appeals.

Testimony at the suppression hearing revealed that on September 4, 1989, investigator Joseph Farmer of the Will County Sheriff's Department was investigating the death of a 17-year-old drowning victim the night before. Investigator Farmer had received information that on the night of September 3, 1989, the victim and several other youths had gone to the Three Rivers Marina for a party on a yacht moored there. The information received also indicated that while on the yacht, the youths drank beer and smoked marijuana. Investigator Farmer and other investigators arrived at the marina on the afternoon of September 4, 1990, and approached that yacht in question. Defendant Elizabeth Chartier met the investigators on the dock and, after being informed of the purpose of their visit, consented to their entry onto the yacht.

Investigator Farmer then explained to Elizabeth that the sheriff's department had been informed that the drowning victim and other youths had been on the yacht the night before drinking beer and smoking marijuana, and he requested her permission to search the yacht. Elizabeth told Investigator Farmer that the boat was in her husband's name and that she would not consent to a search. At that point, Sergeant Jencon advised Elizabeth that the sheriff's department had been in contact with the State's Attorney's office and that a search warrant could be obtained. Sergeant Jencon also informed her that the individuals on the yacht would have to leave the boat until the warrant was obtained.

As the investigators, Elizabeth and her guests were leaving the yacht, they encountered Kenneth Chartier on the dock. Investigator Farmer informed Kenneth of the

information received by the sheriff's department, the reason for their investigation, and their desire to search the boat with Kenneth's consent. Kenneth inquired what would happen if he did not consent, and Investigator Farmer told him a warrant could be obtained. Kenneth then gave his consent for a search of the yacht. Kenneth was advised of his constitutional rights and his right to refuse to consent to the search, and he signed both a constitutional rights form and a consent to search form. Kenneth accompanied the investigators and they boarded the yacht. During the search, evidence was seized which formulated the basis of the criminal charge.

Following presentation of the foregoing evidence, the trial court determined that the consent to search form executed by Kenneth was not freely and voluntarily given. The trial court concluded that Kenneth's consent was vitiated by the threats of the officers that they "would" obtain a search warrant and that the Chartiers and their guests would have to leave the yacht in the interim. The majority supports the trial court decision, stating that based on the evidence before the trial court, its decision was not clearly unreasonable and does not warrant disturbance. I disagree.

The State must prove by a preponderance of the evidence that consent was voluntarily given in order to support a search undertaken pursuant to a consent form. (*People v. Holliday* (1983), 115 Ill. App. 3d 141.) Voluntariness, as it relates to consent searches, is a question of fact to be determined from the totality of all of the circumstances under which consent was given. (*Schneckloth v. Bustamonte* (1973), 412 U.S. 218; *People v. Griffin* (1987), 158 Ill. App. 3d 46.) In this instance the circumstances

reveal that Kenneth Chartier was properly informed of his rights and voluntarily gave signed consent to a search of his yacht.

The majority concludes that because the investigators informed defendants that a search warrant could be obtained and that the premises would be secured in the meantime, the trial court reasonably found that consent was not voluntary. However, it has been held that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." (*Segura v. United States* (1984), 468 U.S. 796.) The instant case involves a yacht which was being used as a dwelling for several persons over a holiday weekend, therefore the reasoning of *Segura* is applicable. The sheriff's department had received information indicating that defendants were hosting a party on their boat at which marijuana was present, and informed Kenneth of accepted procedures to ensure that any potential evidence was not removed from the yacht before a search warrant could be obtained. I do not believe this to be coercive so as to nullify Kenneth's unambiguous, voluntary consent. Accordingly, I dissent.

APPENDIX

B

Docket No. 70914 – Agenda 15 – May 1991.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. EVA CASAZZA *et al.*, Appellees.

JUSTICE FREEMAN delivered the opinion of the court:

The State appeals the decision of the appellate court which affirmed the grant by the circuit court of Will County of the motion to suppress of respondents, Eva Casazza, Elizabeth Chartier and Kenneth Chartier.

BACKGROUND

Respondents were charged with unlawful delivery and possession of cannabis. (Ill. Rev. Stat. 1989, ch. 56½, pars. 705(a), 707(a), 704(b).) Thereafter, respondents moved to suppress the evidence seized during a search of a yacht owned by respondents Chartiers. After an evidentiary hearing, the trial court granted respondents' motion. The appellate court, with one justice dissenting, affirmed the decision of the trial court. 202 Ill. App. 3d 792.

FACTS

The testimony adduced at the hearing on respondents' motion revealed the following. On the morning of September 4, 1989, officers of the Will County sheriff's department were assigned to investigate the drowning of a juvenile at the Three Rivers Marina in Wilmington, Illinois. The police had received information that the drowning victim and some friends consumed beer and smoked marijuana with two older women aboard a 50-food, maroon and white yacht docked at the Three Rivers

Marina on the evening of September 3. Before going to the marina, the officers had been instructed by an assistant State's Attorney to locate the yacht owner and request permission to search it. They were further instructed to remove the occupants of the yacht until they obtained a search warrant if the owner did not consent to a search.

The police went to the marina and, upon approaching the yacht in question, were met by Elizabeth Chartier. The officers advised Elizabeth of the reason for their presence and asked to speak with her. Elizabeth then invited the officers aboard the yacht. After advising her of their information as to the youths' use of alcohol and marijuana aboard the yacht the night before, the officers requested permission to search the yacht. Elizabeth informed the officers that the yacht was in her husband's name and that they could not search it.

The officers advised Elizabeth that they either "could" or "would" obtain a search warrant, if necessary, and further that the people aboard the yacht would have to leave the vessel while the officers did so. As the people aboard were leaving the yacht, the officers were met at the boat entrance by Kenneth Chartier. After advising him of the reason for their presence and that their information as to the activity aboard the yacht the night before, the officers asked Kenneth for permission to search it. Kenneth then asked what would happen if he did not consent to a search. The officers repeated to Kenneth the advice which they had given to Elizabeth. After requesting a minute to think about it, Kenneth consented to a search of the yacht.

Before searching the yacht, the officers advised Kenneth of his *Miranda* rights and his right to refuse permission to search the yacht. They also presented Kenneth with a form advising him of his *Miranda* rights and a consent to search form. Kenneth signed both forms after reading them. The officers also advised Kenneth that he could accompany them as they searched the yacht, which he did.

DISCUSSION

In granting the motion to suppress, the trial court reasoned that the fact the police told Kenneth that the occupants of the yacht would have to leave it if he did not consent to a search vitiated his consent. The court found that the consent was not given freely and voluntarily but under duress. The court also stated that it did not think the police had the right to tell the occupants of the yacht that they had to leave it while the police procured a search warrant.

In affirming the trial court, the appellate court concluded that, while it might have decided the issue differently as a trial court, it could not say, based on the record before it, that the trial court's decision was clearly unreasonable. (202 Ill. App. 3d at 795.) In dissenting, Justice Heiple, citing *Segura v. United States* (1984), 468 U.S. 796, 82 L. Ed. 2d 599, 104 S. Ct. 3380, concluded that the police had merely informed Kenneth of accepted procedures to ensure that evidence was not removed from the yacht before a search warrant was obtained and that this was not coercive so as to nullify Kenneth's voluntary consent, 202 Ill. App. 3d at 797 (Heiple, P.J., dissenting).

The voluntariness of a consent to a police search depends on the totality of the circumstances and it is the State's burden to show by a preponderance of the evidence that the consent was voluntarily given. (*People v. Daugherty* (1987), 161 Ill. App. 3d 394; *People v. Branham* (1985), 137 Ill. App. 3d 896; *People v. Koniecki* (1985), 135 Ill. App. 3d 394.) A trial court's determination of the voluntariness of a consent will not be disturbed unless it is clearly unreasonable. *People v. DeMorrow* (1974), 59 Ill. 2d 352, 358.

In appealing the decisions below, the State argues that the preponderance of the evidence established that Kenneth voluntarily consented to the search of the yacht. Specifically, the State attacks the trial court's purported reliance for the opposite conclusion upon its findings that: (1) the police told respondents, not that they "could," but that they "would" obtain a search warrant if Kenneth did not consent to a search; and (2) the police also told respondents that, if Kenneth did not consent, they would have to leave the boat until the officers obtained a search warrant.

Preliminarily, we find no need to address the validity of the first finding as a basis for the trial court's ruling. Notwithstanding that finding, the record reveals that the trial court's *ratio decidendi* was its finding that Kenneth's consent had been coerced by the position taken by the police that the occupants of the yacht would have to leave it if he did not consent to a search. Thus, we need only address the validity of that finding as a basis for the trial court's ruling.

Cutting to the heart of its argument, the State asserts that the conduct of the police was lawful and within the parameters of the fourth amendment as decided in *Segura*. *Mincey v. Arizona* (1978), 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408, and *Rawlings v. Kentucky* (1980), 448 U.S. 98, 65 L. Ed. 2d 633, 100 S. Ct. 2556. Specifically, the State relies upon the statement in *Segura* that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." (*Segura*, 468 U.S. at 810, 82 L. Ed. 2d at 612, 104 S. Ct. at 3388.) The State thus concludes that, as a matter of law, the conduct of the police in this case cannot be found coercive so as to invalidate Kenneth's consent to the search.

However, the problem with this argument is that only one justice concurred in part IV of Chief Justice Burger's lead opinion in *Segura*, in which the language cited by the State appears. Thus, that portion of *Segura* does not constitute binding precedent upon this or any other State or Federal court.

In reply, the State cites the following language in part I of *Segura*, in which a majority of the justices joined:

> "[W]e conclude that, assuming that there was a *seizure* of all the contents of the petitioners' apartment when agents secured the premises from within, that seizure did not violate the Fourth Amendment. Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody

> and, for no more than the period here involved, secure the premises from within to preserve the status quo while other officers, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment[] * * * ." (Emphasis in original.) (*Segura*, 468 U.S. at 798, 82 L. Ed. 2d at 604, 104 S. Ct. at 3382.)

The State asserts that the foregoing language reveals that the majority joined in the legal conclusion reached in part IV of *Segura* even though they disagreed with its underlying rationale as expressed in part IV.

We cannot agree with the State's interpretation of the import of this language. A careful reading of part IV of *Segura* and the quoted language from part I convinces us that part I was intended to summarize both the legal conclusion reached in part IV and the rationale given therein for that conclusion. Thus, we cannot see how the joining in part I of *Segura*, by the justices who declined to join part IV, constitutes an agreement with the legal conclusion of part IV but not its rationale.

A more reasonable interpretation as to the reason why the other majority justices joined in the foregoing language of part I is that they did so as the result of oversight. This oversight is understandable when part I is read in its entirety. Such a reading makes clear that part I was intended to be a brief statement of the issues presented in the case and of the holdings thereon in the dispositive portions of the opinion, parts IV and V. That being the case, it is understandable that the majority justices would focus upon parts IV and V and overlook part I. In short, we find that the concurrence in part I by a majority of the Court does not remedy its failure to

concur in part IV of the opinion. See Dressier, *A Lesson in Incaution, Overwork and Fatigue: The Judicial Miscraftmanship of Segura v. United States*, 26 Wm. & Mary L. Rev. 375 (1985).

Further in reply to respondents' attack upon *Segura*, the State cites several Federal court cases which have nonetheless followed and adopted part IV of *Segura* to uphold warrantless searches. (*See, e.g., United States v. George* (9th Cir. 1989), 883 F.2d 1407; *United States v. Morales* (11th Cir. 1989), 868 F.2d 1562.) However, we are not likewise persuaded. As respondents point out, a Federal district court's and the government's reliance on part IV of *Segura* has been criticized as based on a mischaracterization of parts of that section of *Segura* as a holding of the Supreme Court. (*United States v. Napue* (7th Cir. 1987), 834 F.2d 1311, 1326 n.16.) We agree with the *Napue* court that part IV of *Segura* has no binding effect upon lower Federal and State courts. (See also *State v. Bolt* (1984), 142 Ariz. 260, 689 P.2d 519.) As such, it is of no avail to the State in defending the police conduct in this case.

Similarly unavailing to the State are the *Mincey* and *Rawlings* cases cited by Chief Justice Burger as support for his conclusion in part IV of *Segura*. In citing those cases, the Chief Justice noted that the Court had not previously had occasion to consider whether the temporary securing of a dwelling to prevent the destruction or removal of evidence violated the fourth amendment where the police had probable cause to believe evidence of criminal activity was on the premises. However, the Chief Justice noted, the Court, in *Mincey* and *Rawlings*, had previously suggested that the securing of premises under such circumstances does not violate the fourth

amendment, at least when undertaken to preserve the status quo while a search warrant is being sought. *Segura v. United States* (1984), 468 U.S. 796, 809, 82 L. Ed. 2d 599, 611, 104 S. Ct. 3380, 3387.

The problem with the State's reliance on *Mincey* and *Rawlings*, beyond the fact that they were cited in support of conclusions reached in part of *Segura* which does not represent the view of the majority of the Supreme Court, is that we disagree with the interpretation of those cases in part IV of *Segura*.

In discussing *Mincey*, Chief Justice Burger stated that the Court had therein "noted with approval" that, to preserve evidence, a police guard had been stationed at the entrance to an apartment in which a shooting had occurred during a drug raid, "even though '[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant.' " *Segura*, 468 U.S. at 809, 82 L. Ed. 2d at 611, 104 S. Ct. at 3387, quoting *Mincey v. Arizona* (1978), 437 U.S. 385, 394, 57 L. Ed. 2d 290, 301, 98 S. Ct. 2408, 2414.

In the portion of *Mincey* to which the Chief Justice referred, the Supreme Court addressed the State's argument, *inter alia*, that exigent circumstances justified the warrantless search at issue. In rejecting that argument, the Court stated that, except for the fact that the offense under investigation was a homicide, there were no exigent circumstances. Moreover, the Court noted the lack of any indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant and that, "Indeed, the police guard at the apartment minimized that possibility." *Mincey v. Arizona*

(1978), 437 U.S. 385, 392-94, 57 L. Ed. 2d 290, 299-301, 98 S. Ct. 2408, 2413-14.

In contrast to Chief Justice Burger, we cannot say that our reading of *Mincey* supports the conclusion that the Court "noted with approval" the police conduct in that case. Rather, we believe that, in noting that the police conduct of guarding the premises had minimized the possibility of evidence-tampering, the court was merely noting the obvious result of that conduct without either approving or disapproving it. See Dressier, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftmanship of Segura v. United States*, 26 Wm. & Mary L. Rev. 375, 413 (1985).

Assuming, *arguendo*, that the *Mincey* Court actually approved of the police conduct at issue, the police conduct, as well as the surrounding circumstances, in this case are fundamentally different from those in *Mincey*. Thus, *Mincey* is factually distinguishable from this case and of no avail to the State here.

In discussing *Rawlings*, Chief Justice Burger noted that, although officers secured, from within, the home of a person for whom they had an arrest warrant, and detained all occupants of the home while they obtained a search warrant, the Court did not question the admissibility of evidence discovered pursuant to the later-issued search warrant. (*Segura*, 468 U.S. at 809, 82 L. Ed. 2d at 611, 104 S. Ct. at 3387-88.) However, the *Rawlings* Court never squarely addressed the legality of the police conduct in that case, *i.e.*, securing the premises from within and detaining its occupants after detecting the

smell of marijuana, which was comparable to the police conduct in *Segura* and in this case.

In the first part of *Rawlings*, the Court held that the petitioner, one of the persons detained by the police, lacked a reasonable expectation of privacy in the purse of his female companion so as to allow him to object to a search of the purse. (*Rawlings v. Kentucky* (1980), 448 U.S. 98, 104-06, 65 L. Ed. 2d 633, 641-42, 100 S. Ct. 2556, 2561-62.) In the second part of *Rawlings*, the only part involving the legality of police conduct comparable to that here, the Court held that, even assuming that the detention of the occupants of the premises raided was illegal, the petitioner's incriminating statements were admissible against him because they were not the product of the detention. (*Rawlings*, 448 U.S. at 1016-10, 65 L. Ed. 2d at 642-45, 100 S. Ct. at 2562-64.) In the third part of *Rawlings*, the Court held that the search of the petitioner's person following his admission of ownership of the drugs found in his companion's purse was incident to a lawful arrest. *Rawlings*, 448 U.S. at 110-11, 65 L. Ed. 2d at 645-46, 100 S. Ct. at 2564.

As the *Rawlings* Court assumed the illegality of the police conduct in that case, we are hardpressed to see how *Rawlings* can be of any support for the legality of the police conduct in this case. See Dressler, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftmanship of Segura v. United States*, 26 Wm. & Mary L. Rev. 375, 414 (1985).

Finally, we do not find *Arkansas v. Sanders* (1979), 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586, of any assistance to the State. In *Sanders*, the State sought to justify the

warrantless search of a suitcase that the police had probable cause to believe contained marijuana on the ground, *inter alia*, that the only result of waiting for a warrant would have been inconvenience to all concerned. The Supreme Court observed that those defendants who find the inconvenience of waiting for the issuance of a search warrant unacceptable may avoid it simply by consenting to a warrantless search. *Sanders*, 442 U.S. at 764 n.12, 61 L. Ed. 2d at 245 n.12, 99 S. Ct. at 2593 n.12.

The State cites the court's observation in arguing that the police in this case merely explained the available options to Kenneth and permitted him to choose between them. We do not find the cited observation applicable here because, unlike this case, there was no issue in *Sanders* concerning the authority of the police to seize the suitcase which was the subject of the warrantless search. Here, in contrast, it was the police's illegal representation that they had authority to seize the yacht which, the trial court correctly found, vitiated the voluntariness of Kenneth's consent to the search. *Sanders* does not compel a reversal of the judgments herein.

In view of our conclusion that *Segura, Mincey, Rawlings*, and *Sanders* provide no support for the police conduct in this case, we cannot find the trial court's determination as to the voluntariness of Kenneth's consent to the warrantless search of his yacht clearly unreasonable. Therefore, we cannot disturb that determination. *People v. DeMorrow* (1974), 59 Ill. 2d 352, 358.

For all of the reasons stated herein, the judgments of the circuit court and the appellate court sustaining respondents' motion to suppress are affirmed.

Judgments affirmed.

JUSTICE HEIPLE took no part in the consideration or decision of this case.